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CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 679

THE CHOCTAW NATION,

Petitioner,

vs.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 679

THE CHOCTAW NATION,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

Your petitioner respectfully prays for a writ of certiorari to review a judgment of the Court of Claims, affirming the Indian Claims Commission.

Opinion Below

The opinion of the Court of Claims is shown in the transcript (R. 16-27).

Jurisdiction

The petitioner, within the time allowed, filed its motion for a new trial, and the order denying the same was entered by the Court of Claims on December 4, 1951 (R. 28). This

Court granted an extension of time within which to file this petition (R. 29).

Jurisdiction of the Court is invoked under 28 U. S. C. A. sec. 1255; Sup. Ct. Rule 41.

Statement of Case

The petition filed in the Claims Commission sought judgment reimbursing petitioner for tribal funds distributed as per capita payments to forty-one persons who were, arbitrarily and without tribal consent, placed upon the Choctaw rolls under authority of the Act of Congress approved August 1, 1914 (38 Stat. 582). Petitioner claims that the tribal rolls were, by agreement with the United States, complete and final when a list embracing the names of those persons entitled to enrollment had been prepared by a Commission appointed for that purpose, and submitted to and approved by the Secretary of the Interior, and that the persons whose names were found thereon constituted the membership of the tribe (R. 2).

Petitioner contended that the Act of Congress authorizing the enrollment of the additional persons in 1914, did not constitute a valid exercise of the plenary powers of Congress over Indians and their property, but that said act constituted a confiscation of its property, in that it took the same without its consent and gave it to others.

The funds for which judgment is sought were funds paid to these persons in the form of cash payments, which represented a distribution of the accumulated tribal funds coming from the sale of the common properties and are commonly called per capita payments.

Respondent moved to dismiss in the Claims Commission and the case was tried on the pleadings, without the introduction of any testimony. Judgment was rendered in the Claims Commission against petitioner (R. 13). The Court

of Claims affirmed, and the case is here on petition for certiorari to review the judgment of the Court of Claims.

Questions Presented

The decisive questions are:

(a) Did the Congress in the first instance have the right to enact legislation, adding persons to the tribal rolls without the consent of the tribes and contrary to the provisions of the Atoka and Supplemental Agreements, hereinafter mentioned?

(b) Did the Secretary of the Interior pursuant to the Act of August 1, 1914, have any right to distribute accumulated tribal funds in the form of per capita payments to those persons or their heirs?

Statutes and Treaties Involved

There are involved the following statutes and treaties, namely:

(a) Section 21, Act of June 28, 1898 (30 Stat. 495), being a part of the Atoka Agreement;

(b) Sections 30 and 35 of the Act of July 1, 1902 (32 Stat. 641), being a part of the Supplemental Agreement; and

(c) Latter part of Section 17 of Act of August 1, 1914 (38 Stat. 582).

The provisions above mentioned are set out in the appendix.

Reasons for Granting the Writ

1. The opinion of the court below conflicts with decisions of this Court, among which are

Choate v. *Trapp*, 224 U. S. 672, 56 Law Ed. 941, 32 S. Ct. 565;

United States v. *Creek Nation*, 295 U. S. 102, 109, 110; 52 S. Ct. 681, 79 Law Ed. 448;
United States v. *Minnesota*, 270 U. S. 181, 70 Law Ed. 539;
United States v. *Mille Lac Band of Indians*, 229 U. S. 498, 57 Law Ed. 1299;
Chippewa Indians of Minnesota v. *United States*, 301 U. S. 358, 57 S. Ct. 826.

2. The opinion below sets at naught and renders meaningless certain provisions of the treaties entered into by petitioner with the respondent, taking from petitioner and giving to others $41,000.00 of funds held in trust.

3. The opinion, if permitted to stand, will have a controlling effect upon other cases pending in the Claims Commission, involving provisions of the allotment agreements entered into with the Five Civilized Tribes of Indians, and involving a construction of the Act of August 13, 1946, creating the Claims Commission.

4. The court below in applying the doctrine of judicial notice, went out of the record to decide this case.

BRIEF

Criteria for Enrollment

The court erred in holding as an established fact that the criteria for the enrollment of the forty-one persons here involved were the same as the criteria applied to the original membership. The respondent contended before the Claims Commission and in the court below that the Atoka and Supplemental agreements were only acts of Congress, having no force and effect as contracts. The court below rejected that contention, holding and said that the original enrolled members had a vested right, by reason of these treaties, not only in their individual allotments as such, but in their pro-rata shares of the undistributed common funds of the tribe. That the court was abundantly fortified in this statement, goes without question. *Choate* v. *Trapp*, 224 U. S. 665, 56 Law Ed. 941. But the court after reaching that result nevertheless concludes as a matter of law that the petitioner was not entitled to prevail. This reasoning is inconsistent with the conclusion. If the tribe had a vested right as the court says (and as it most certainly did) in its lands and funds, that right could not be divested by a unilateral act of Congress without rendering the United States liable. *Choate* v. *Trapp; U. S.* v. *Creek Nation, supra.* But the court below said (without any testimony in the record) that the persons to whom reference is made in the 1914 act met all the requirements that were applied to the original members who were admitted into the tribe. The court also falls into error in saying:

> "The responsibility of compiling such rolls and the power for establishing the criteria for membership were lodged with the Congress." (R. 22.)

No language in either the Original Atoka or the Supplemental Agreement provided that the responsibility of com-

piling the rolls was lodged solely with Congress. On the contrary, the two treaties show a purpose to specifically provide how the rolls should be compiled. If the opinion below correctly states the law, no meaning whatever can be given to the clear-cut provisions in the treaties dealing with the making up of the rolls. In one place in the Supplemental Agreement the language it:

> "Said Commission shall make such rolls descriptive of the persons thereon, so that they may be thereby identified, and it is authorized to take a concensus of each of said tribes, or to adopt any other means by them deemed necessary to enable them to make such rolls."

Again, in the same treaty it is provided:

> "The rolls so made, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon, with their descendants thereafter born to them, with such persons as may intermarry according to tribal laws, shall alone constitute the several tribes which they represent."

Again, in the Supplemental treaty it is said:

> "The lists thus prepared when approved by the Secretary shall constitute a part and parcel of the final rolls of the citizens of the Choctaw and Chickasaw tribes, and of the Choctaw and Chickasaw freedmen, upon whom allotments of land, and the distribution of their tribal property shall be made, as herein provided."

Then, again, the Supplemental treaty says:

> "No person who does not appear upon the rolls prepared as herein provided shall be entitled to in any manner participate in the distribution of the common property of the Choctaw and Chickasaw tribes, and those whose names appear thereon shall participate in the manner set forth in the agreement."

The opinion of the court below leaves these unambiguous provisions wholly without meaning and force. It is well-known that many thousands of persons were applying for enrollment in these tribal domains, and there never was any intention to leave to Congress by some unilateral action to say who should constitute the membership of the tribe. In saying, as the treaty did, that the persons whose names appear as herein provided should alone constitute the membership, that language forestalled any possibility that the Congress of the United States might arbitrarily say who should be members and who should participate in allotments and in the distribution of this tribe's properties. The tribal representatives and the Dawes Commission tried in writing these provisions in the agreements to prevent the very thing that has actually been done. The Congress had no right to play Santa Claus with the trust funds of this tribe. That the common properties in addition to allotments were clearly in contemplation and clearly and specifically provided for, cannot be subject to the slightest question. The language hereinabove quoted deals with the undistributed tribal properties as well as allotments of lands. The fact that the Congress was dealing with funds arising from the sale of the common properties makes no difference. If, as was said by this Court in *Choate* v. *Trapp*, *supra*, the members of the tribe had a vested right in their allotments, they had by the same yardstick a vested right in all of the undistributed common properties. The opinion below agrees that this is true, and yet the opinion goes on to say that the Congress was clothed with sole power to determine who should be on the rolls and that Congress properly ordered these persons enrolled. We think this is an obvious and fundamental error, which goes to the very basis of the two treaties that provided for the distribution of the common assets of these tribes.

The opinion below says:

> "It did not alter in any respect the criteria for membership which had been applied to those who were on the rolls in 1907."

That this is an entirely incorrect statement would seem to be obvious, as those whose names were on the rolls pursuant to the provisions of the treaty, to which we have called attention, had to be already on authenticated tribal rolls, living in the tribe, or had run the gauntlet of the Dawes Commission or the Citizenship Court, both of which agencies were specifically provided for in these treaties. We shall discuss the Citizenship Court at another point, but the test applied to those who were on the rolls that were closed in 1907, were persons who had qualified as persons on the recognized tribal rolls and residents of the Indian country, or who had processed their claims through the Dawes Commission, or had to be admitted by decree of the Citizenship Court, which was created in the Act of 1902, later ratified as the Supplemental Treaty. We submit that no language could be more clearly framed to provide how the rolls should be compiled than was employed by the makers of these treaties and the representatives of the United States Government.

The problem of compiling the rolls was the most vital problem with which the treaty makers were concerned. In breaking up the vast tribal domains, then populated with the white citizenship exceeding in numbers the members of these tribes, the question as to who was entitled to participate in the allotments of the lands and the distribution of the common properties was well-known to be the most important work in connection with a dissolution of the tribal governments. At the time the treaties were made with the Five Civilized Tribes, there were more than two hundred thousand white persons in the area comprising

the Five Civilized Tribes, known as the Cherokees, Choctaws, Chickasaws, Seminoles, and Creeks. See Senate Report, 53rd Congress, Second Session, No. 377; Kappler's Laws and Treaties, Vol. 2, pp. 910, 918, 931, 942; Mills' Oklahoma Indian Land Laws, p. 3. Many of these were seeking to establish membership.

A great many persons seeking membership in the tribes procured judgments of the federal court, finding them to be members. *Wallace* v. *Adams*, 204 U. S. 415, 51 Law ed. 547. One of the very purposes in creating the Citizenship Court was to review these court judgments under which persons had been placed upon the tribal rolls. Another purpose was to hear and adjudicate in a tribunal created solely for that purpose, the claims of any and all persons who might believe that they were entitled to share in the tribal properties. That court was composed of three judges, appointed by the President. Its powers and duties were prescribed by the Supplemental Agreement. That court and the Dawes Commission had the responsibility of determining the rights of persons claiming the right to enrollment. The Citizenship Court was created solely for the Choctaw and Chickasaw Nations. The Dawes Commission functioned as to all of the Five Tribes, and, in speaking of its powers and duties, the Eighth Circuit Court of Appeals said:

> "It embodied and ratified the agreement between the Creek Nation and the United States, which was shortly after ratified by the Creek Nation, that the Dawes Commission should make a final roll of the latter's citizens, that for that purpose the Commission should have access to all of its rolls and records, and that it might take a census of the nation, or adopt any other means by the Commission deemed necessary to enable it to make such rolls."
>
> *Folk* v. *United States*, 233 F. 188.

The Dawes Commission was a quasi-judicial body. It was on the ground with its agents, interpreters, attorneys and investigators. It was required to give force and effect to treaty stipulations and to the authenticated rolls that then existed in the Five Nations, the usages and customs of the tribes, and to function as a quasi-judicial tribunal. *Folk* v. *U. S., supra; Page* v. *Atkins*, 208 Pac. 807, 86 Okl. 290. The tribe wanted such a tribunal to handle such affairs and never contemplated that a political body would say, without its consent, who were its members.

Throughout the many cases decided by the state and federal courts, it has been repeatedly said that the Dawes Commission was a quasi-judicial tribunal, selected by the tribes and the federal government as the agency or instrumentality by which the tribal rolls should be made up and compiled. To say, as the opinion below does, at this late date that Congress could direct the Secretary of the Interior, wholly without the consent of the tribes, to enroll forty-one persons on the Choctaw rolls, is to totally disregard plain provisions written into the treaties when the program of allotment of lands was being formulated. The act of Congress here in question says:

> "The Secretary of the Interior is hereby authorized to enroll on the proper respective rolls of the Five Civilized Tribes as indicated, the persons enumerated in Senate Document —."

See Act ot August 1, 1914 (38 Stat. 582.) The foregoing legislative enactment does not attempt in any wise to say that the persons named in the senate document should have their claims processed through any court or commission. It arbitrarily and without the consent of the tribes directed the Secretary to do a thing that the Secretary was powerless to do if the treaties had any meaning whatsoever. If the Congress by unilateral action could direct

the enrollment of forty-one persons, we submit that by the same process of reasoning the Congress could direct the enrollment of forty-one thousand persons. Why stop at forty-one?

Moreover, the act of Congress of June 21, 1906 (34 Stat. 325) is a clear-cut Congressional interpretation of the treaty provisions to which we have referred and supports our contention that it was never believed that Congress could by unilateral action say who constituted the members of the Choctaw and Chickasaw tribes, or to whom the tribal assets should be distributed.

The Act of 1906 says:

> "Provided that the enrollment of said persons by the Commission to the Five Civilized Tribes shall not be objected to by the said tribes."

At the time the 1906 act was passed, there was a Commissioner to the Five Civilized Tribes, and the tribal rolls had not been finally closed, but the Congress evidently did not assume that it had power, without the consent of the tribes, to direct the enrollment of the persons whose names were set out in the 1906 act.

The question of the exercise of the plenary powers of Congress is not an issue in this case. In appraising the situation with which we are here dealing, it must be borne in mind that the Congress was dealing with trust properties with reference to which definite treaty stipulations had been entered into with the petitioner. We think this Court has drawn a clear distinction between plenary powers and confiscation. We think this is confiscation, as the same has been defined by the decisions of this Court. The tribal lands and properties of this tribe were held in the nature of an ancestral estate. The Circuit Court of Appeals has likened the situation to an estate held by a large family. *Schulthis*

v. *McDougal,* 225 U. S. 561. Being an ancestral estate, absolute title to which was in the family, the Congress can no more unilaterally and without consent take the property from these persons than it could have taken the property of General Lee at Arlington following the Civil War. *United States* v. *Lee,* 106 U. S. 193. The situation is almost identical with what was said by this Court in the so-called Chickasaw Freedmen case. *United States* v. *Choctaw Nation,* 193 U. S. 115. There the Chickasaw Nation had not consented to the enrollment of the Chickasaw Freedmen but protested against the same, and this Court said that under the treaties and act of Congress those persons could not be placed upon the rolls without the consent of the tribes and a judgment for better than $600,000 was awarded to the tribes for reimbursement.

In *United States* v. *Mille Lac Band,* 229 U. S. 498, this Court said:

> "This was clearly in violation of the trust before described, and the Indians are entitled to recover for the resulting loss. In principle, it is as if the lands had been disposed of conformably to the Act of 1889, and the net proceeds placed in trust in a trust fund created by Section 7, and the government had then used the money, not for the benefit of the Indians but for some wholly different purpose. That the wrongful disposal was in obedience to directions given by two resolutions of Congress does not make it any the less violation of the trust * * * ."

Again, this Court said in *Lane* v. *Pueblo of Santa Rosa,* 249 U. S. 110:

> "Certainly it would not justify the defendants in treating the lands of these Indians—to which, according to the bill, they have a complete and perfect title—as public lands of the United States, and disposing of the same under the public land laws. That would not be an exercise of guardianship but an act of confiscation."

Again, in *Chippewa Indians of Minnesota* v. *United States,* 301 U. S. 358, this Court said:

> "Our decisions, while recognizing that the government has power to hold and manage the property and affairs of its Indian wards in good faith and for their welfare, shows that this power is subject to constitutional limitations and does not enable the government to give the lands of one tribe or band to another, or to deal with them as its own (citing Sho-Shone Tribe of Indians v. United States, 299 U. S. 476, and other cases)."

Again, in *United States* v. *Creek Nation,* 295 U. S. 102, this Court said:

> "The tribe was a dependent community under the guardianship of the United States, and therefore its property and affairs were subject to control and management of that government, but this power to control and manage was not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it was subject to the limitations inhering in such guardianship and to pertinent constitutional restrictions. It did not enable the United States to give the tribal lands to others or to appropriate them to its own use * * *."

Other cases could be cited but it would seem to us that the ruling of the Court of Claims is clearly in conflict with well-settled decisions of this Court, to which we have directed attention.

This case was submitted to the Commission on a motion to dismiss. Not a word of testimony was taken. Thus, it appears that though there is not a word of proof in the record to show that the persons whose names are found upon the senate document were persons who met the tests applied to those who were on the rolls pursuant to the provisions of the Atoka and Supplemental agreements, they are nevertheless given all the rights of members. Clearly, the 1914 en-

rollees met no tests: they were never passed by (a) the Dawes Commission (b) nor the Citizenship Court (c) nor were they taken as persons on the already authenticated tribal rolls (d) nor, lastly, were they children of enrolled members. So just how it can be said that they met the criteria applied to the original enrollees is difficult to understand.

The opinion below refers to a statement by a Mr. Hill, said to have been an attorney for the Choctaw Nation in some proceeding along in 1908, long before this bill was up for consideration, and whose statement was made before a Congressional committee. Clearly, the court here went out of the record entirely and based its conclusions on ex parte statements of persons who claimed to act as attorneys for the tribe. Whether or not Mr. Hill was actually the attorney for the tribe and in what manner he represented the tribe cannot be determined, as there was no testimony relating to his employment, and what his opinion was as to what constituted a test for enrollment would, of course, be wholly immaterial. Neither could it be said that he had the right to waive any treaty stipulations, even if it were found that he was actually the attorney for the tribe. The record to which the court refers shows that the statement was made in 1908 and not in connection with the particular act of Congress here under consideration. But we think the statement should have no weight whatever, as the court went out of the record in placing its conclusions upon such statements.

The Court Below Was in Error in Treating Gritts v. Fisher (224 U.S. 640, 56 Law ed. 928) and Lowe v. Fisher (223 U.S. 95, 56 Law ed. 364) as Controlling Authorities on the Facts in This Case.

Clearly, the two cases are not authorities for the court's conclusions. They are clearly distinguishable. In the case of *Gritts* v. *Fisher*, this Court said:

> "The council of the tribe had asked that this be done."

Again, in that case the Court said:

> "The persons for whose benefit the change was made were not strangers to the tribe, but were children born into it when it was still in existence."

The consent of the Choctaw tribe was not solicited in this instance. The Congress acted upon its own initiative, and hence there is no parallel. It is also clear that there is no proof that the persons included in the senate document and enrolled in 1914 were not children born to members of the tribe. Hence, the *Gritts* case not only fails to support the court's conclusion but proceeds upon the theory that the consent of the tribe was necessary.

Fisher v. *Lowe*, *supra*, is equally inapplicable. This Court there dealt with the striking by the Secretary from the tentative rolls of the Cherokee tribe certain persons claiming to be freedmen. The striking was done while the rolls were being compiled. The Secretary at that time had a right to act, but here the rolls had long since been closed and the Secretary's power to approve had been wholly terminated years before the passage of this act.

The opinion also seems to give some weight to the case decided by this Court and styled *Wallace* v. *Adams*, 204 U. S. 415, 51 Law ed. 547. In that case this Court upheld the decision of the Citizenship Court as a binding judgment; but it is to be remembered that the Citizenship Court was created by the provisions of the Supplemental Treaty itself. The tribes gave to the Citizenship Court a lawful existence. *Wallace* v. *Adams* has nothing in it that in any wise militates against our contention that the tribes had a vested right in the undistributed property which Congress by unilateral act could not take away from them. This Court referred to the fact that the Citizenship Court was

a tribunal created by the Supplemental Agreement for determining the rights of persons claiming to be citizens. It is clear that in that case this Court simply held that since the treaty and the act of Congress created the Citizenship Court, it was vested with power to determine the claims of persons seeking enrollment.

Testamentary Instruments Where Property Is of a Kind

The court below in dealing with this case, likened the situation to a case where persons take under a testamentary gift, and the court observes that in expressing these views, there are no cases directly in point. We think there is no parallel to be drawn between a case where persons' rights are to be determined under a testamentary gift, and where basic rights of citizenship are involved. The court evidently had in mind a gift to a class of persons, uncertain in number at the time of the gift, to be ascertained at a future time, all of whom take in equal or some in different proportions or shares. But the persons here under consideration are strangers and have no basic right whatever to be included in the gift, as the contracts between the tribes and the government specified how the names of persons entitled to benefits should be ascertained or determined. That was not done here. Gifts to persons in a class, for instance, are dealt with in Thompson on Real Estate, Vol. 5, Perm. Ed., sec. 2708, and in other texts upon the subject, but we see no analogy between that situation and the problem with which the Court is here dealing, for the reason that the treaty provisions set out the manner of ascertaining who are the persons entitled to share in the trust funds of this tribe. The trust provisions have been totally disregarded.

The Court Below Went Out of the Record to Decide this Case

It is obvious from the face of the opinion that in treating as proven facts and evidence on which to decide this case, the court has gone out of the record and considered as per-

tinent facts the statements of United States senators and of attorneys, appearing before Congressional committees. We recognize the general rule which permits a court to take judicial notice of certain types of public documents and matters of common knowledge, but here the court does not deal with such matters. It deals with the statements of senators and attorneys who purport to give their opinions or conclusions as to facts that would be the basis of controversy if they had been presented in the trial court. The statements of Senators Vardaman and Owen, to the effect that certain persons were entitled to citizenship, obviously would be matters that could be controverted, and therefore the subject of proof in the trial court. This Court has held that judicial notice, when taken, has no other effect except to relieve one of the parties of the burden of introducing evidence, and it does not prevent the other party from disputing such matter by evidence. *Ohio Bell Telephone* v. *Public Utilities Commission*, 301 U. S. 292, 57 S. Ct. 724. The instant case was tried before the Claims Commission, without evidence, on a motion by the government to dismiss, and as we understand the law, judicial notice is not a substitute for evidence. In deciding the case on evidence wholly outside of the record, this petitioner was deprived of substantial rights, going to the very basis of petitioner's claim. In Jones on Evidence, Second Edition, 474, the rule is stated as follows:

> "The explanation is that facts susceptible of notice are nevertheless matters of evidence, and hence appellate tribunal can only review evidence considered by the court below."

In a Louisiana case, styled *Cumberland Telephone & Telegraph Co.* v. *St. Louis I. M. & S. Ry.*, 41 So. 492, 117 La. 199, the court said:

> "The appellate tribunal should not extend the rule regarding judicial notice further than is proper to

follow it in the court of first instance. In the appellate court the evidence directly pertinent should be well-known to all parties in interest."

The issue before the Court of Claims was the right of these forty-one persons to participate in the distribution of the common funds, and the standards by which their rights were measured were such standards or tests as were fixed by the two treaties to which we have referred, and we submit that in taking judicial notice of matters that could and should have been introduced as evidence, the court has committed a serious error.

Senator Vardaman represented the State of Mississippi in the Senate, and for many years the rights of Mississippi Choctaws (who never removed west) to enrollment were highly controversial issues before the Congress. It is not difficult to see why Senator Vardaman would state that the Mississippi Choctaws (his constituents) were entitled to membership rights. Neither is it hard to understand why Senator Owen of Oklahoma would make statements to the effect that the Mississippi Choctaws (his clients) were entitled to enrollment. Strange as it may seem, the acts of Congress and records of this Court show that Senator Owen was allowed a fee of $175,000 against the Mississippi Choctaws for services rendered as their attorney in procuring their final enrollment. The act of Congress of September 22, 1922 (42 Stat. 1038), attempted to give the Secretary of the Interior the right to pay Senator Owen $175,000 fee for services in behalf of the Mississippi Choctaws. See *Winton* v. *Amos,* 255 U. S. 373, 65 Law Ed. 684. This act of Congress is a matter of which the Court can properly take judicial notice. Thus it is that both Senator Owen and Senator Vardaman were partisans, both vitally interested in procuring the enrollment of their constituents and clients. Since respondent did not see fit to offer any testimony before the Commission, the court below was clearly in error in going out of the record to consider statements of members

of the Senate relative to what were the rights and criteria applicable to persons seeking enrollment.

Conclusion

We respectfully submit:

(a) That it clearly appears that the re-opening of petitioner's rolls to admit forty-one persons, was a unilateral act on the part of Congress, violating specific provisions of solemn treaty stipulations.

(b) That the Court of Claims was correct in holding that the petitioner had a vested right in its tribal funds, but was in error in concluding, after reaching that result, that the petitioner was not entitled to recover.

(c) That the Secretary of the Interior and his subordinate officers exceeded the limits of authority in making distribution of trust funds to the forty-one persons in question.

(d) That under the settled decisions of this Court the act of Congress attempting to confer rights upon forty-one persons after a lapse of seven years from the closing of the rolls, violates and sets at naught specific treaty stipulations guaranteeing to the membership of the tribes the funds in question.

(e) That the action of the Secretary was not in the course of a lawful exercise of plenary powers, but was an act of confiscation, resulting in the taking of petitioner's funds and giving them to strangers to the tribe.

Respectfully submitted,

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APPENDIX

"Said Commission shall make such rolls descriptive of the persons thereon, so that they may be thereby identified, and it is authorized to take a census of each of said tribes, or to adopt any other means by them deemed necessary to enable them to make such rolls.

* * * * * * *

"The rolls so made, when approved by the Secretary of the Interior, shall be final and the persons whose names are found thereon, with their descendants thereafter born to them, with such persons as may intermarry according to tribal laws, shall alone constitute the several tribes which they represent."

—Atoka Agreement, Sec. 21, Act of June 28, 1898, 30 Stat. 495.

"The lists thus prepared, when approved by the Secretary of the Interior, shall constitute a part and parcel of the final rolls of citizens of the Choctaw and Chickasaw tribes and of the Choctaw and Chickasaw freedmen, upon which allotment of land and distribution of other tribal property shall be made as herein provided. Lists shall be made up and forwarded when contests of whatever character shall have been determined, and when there shall have been submitted to and approved by the Secretary of the Interior lists embracing names of all those lawfully entitled to enrollment, the rolls shall be deemed complete.

* * * * * * *

"No person whose name does not appear upon the rolls prepared as herein provided shall be entitled to in any manner participate in the distribution of the common property of the Choctaw and Chickasaw tribes, and those whose names appear thereon shall participate in the manner set forth in this agreement."

—Supplemental Agreement, Sections 30 and 35, Act of July 1, 1902, 32 Stat. 641.

"The Secretary of the Interior is hereby authorized to enroll on the proper respective rolls of the Five Civilized Tribes, as indicated, the persons enumerated in Senate Document Numbered Four hundred and seventy-eight, Sixty-third Congress, second session: Provided, That when so enrolled there shall be paid to each and every such person out of the funds in the Treasury of the United States to the credit of the respective tribe with which such persons is enrolled the following sums in lieu of an allotment of land: To each such person placed on the Creek rolls the sum of $800; to each such person placed on the Choctaw, Chickasaw, Cherokee, and Seminole rolls, a sum equal to twice the appraised value of the allotment of such tribe as fixed by the Commission to the Five Civilized Tribes for allotment purposes; Provided further, That in cases where such enrolled members, or their heirs, are Indians who by reason of their degree of Indian blood belong to the restricted class, the Secretary of the Interior may, in his discretion, withhold such payments and use the same for the benefit of such restricted Indians. . . ."

—From Sec. 17, Act of August 1, 1914, 38 Stat. 582.

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 679

THE CHOCTAW NATION, *Petitioner*

v.

THE UNITED STATES

On Petition for a Writ of Certiorari to the United States Court of Claims

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Indian Claims Commission (R. 4-13) is not reported. The opinion of the Court of Claims (R. 16-27) is reported at 100 F. Supp. 318.

JURISDICTION

The judgment of the Court of Claims was entered on October 2, 1951 (R. 28). A motion for new trial was denied on December 4, 1951 (R. 28). On February 26, 1952, the Chief Justice extended the time for filing a petition for a writ of certiorari

to April 2, 1952 (R. 28). The petition for writ of certiorari was filed on March 28, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1255(1).

QUESTION PRESENTED

Whether enactment of a statute providing that the jurisdiction of the Secretary of the Interior to approve enrollment of Indians on the rolls of the Choctaw Nation should end March 4, 1907, prevented Congress in 1914 from authorizing him to add other Indians to the rolls and to make payments to them from the undistributed funds of the tribe.

STATUTES INVOLVED

1. Section 21 of the Act of June 28, 1898, 30 Stat. 495, 502, provides in part:

> Said commission[1] is authorized and directed to make correct rolls of the citizens by blood of all the other tribes, eliminating from the tribal rolls such names as may have been placed thereon by fraud or without authority of law, enrolling such only as may have lawful right thereto, and their descendants born since such rolls were made, with such intermarried white persons as may be entitled to Choctaw and Chickasaw citizenship under the treaties and the laws of said tribes.
>
> * * *

[1] Identified in section 11 of the Act, 30 Stat. 497, as the "Dawes Commission".

Said commission shall make such rolls descriptive of the persons thereon, so that they may be thereby identified, and it is authorized to take a census of each of said tribes, or to adopt any other means by them deemed necessary to enable them to make such rolls. * * *

The rolls so made, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon, with their descendants thereafter born to them, with such persons as may intermarry according to tribal laws, shall alone constitute the several tribes which they represent.

2. The Act of July 1, 1902, 32 Stat. 641, 646, 649, provides in part:

Section 30. For the purpose of expediting the enrollment of the Choctaw and Chickasaw citizens and Choctaw and Chickasaw freedmen, the said Commission shall, from time to time, and as early as practicable, forward to the Secretary of the Interior lists upon which shall be placed the names of those persons found by the Commission to be entitled to enrollment. The lists thus prepared, when approved by the Secretary of the Interior, shall constitute a part and parcel of the final rolls of citizens of the Choctaw and Chickasaw tribes and of Choctaw and Chickasaw freed-

men, upon which allotment of land and distribution of other tribal property shall be made as herein provided. Lists shall be made up and forwarded when contests of whatever character shall have been determined, and when there shall have been submitted to and approved by the Secretary of the Interior lists embracing names of all those lawfully entitled to enrollment, the rolls shall be deemed complete. * * *

* * *

Section 35. No person whose name does not appear upon the rolls prepared as herein provided shall be entitled to in any manner participate in the distribution of the common property of the Choctaw and Chickasaw tribes, and those whose names appear thereon shall participate in the manner set forth in this agreement: * * *.

3. A proviso to section 2 of the Act of April 26, 1906, 34 Stat. 137, 138, declares:

That the rolls of the tribes affected by this Act shall be fully completed on or before the fourth day of March, nineteen hundred and seven, and the Secretary of the Interior shall have no jurisdiction to approve the enrollment of any person after said date: * * *.

4. Section 17 of the Act of August 1, 1914, 38 Stat. 582, 600, provides in part:

> The Secretary of the Interior is hereby authorized to enroll on the proper respective rolls of the Five Civilized Tribes, as indicated, the persons enumerated in Senate Document Numbered Four hundred and seventy-eight, Sixty-third Congress, second session: *Provided,* That when so enrolled there shall be paid to each and every such person out of the funds in the Treasury of the United States to the credit of the respective tribe with which such person is enrolled the following sums in lieu of an allotment of land: To each such person placed * * * on the Choctaw * * * rolls, a sum equal to twice the appraised value of the allotment of such tribe as fixed by the Commission to the Five Civilized Tribes for allotment purposes: * * *.

STATEMENT

This proceeding was commenced by the filing with the Indian Claims Commission of a petition (R. 1-2) asserting a violation of the so-called Atoka Agreement incorporated in section 29 of the Act of June 28, 1898, 30 Stat. 495, 505, and of the Supplemental Agreement made law by the Act of July 1, 1902, 32 Stat. 641. The petition alleged that these statutes had provided for compiling rolls of the members of the Choctaw Tribe and for distributing the properties of the Tribe to those en-

rolled. It further alleged that these rolls "became final and the persons whose names were found thereon alone constituted the membership of the Tribe." It finally alleged that thereafter section 17 of the Act of August 1, 1914, 38 Stat. 582, authorized the Secretary of the Interior to add 41 names to the rolls and to pay them $41,000 from the tribal funds without petitioner's assent. The petition asked judgment for $41,000 plus interest, on the ground that the 1914 Act was "a confiscation of the tribal domain by an unauthorized enlargement of the plenary and political power of Congress" (R. 14).

The Government's motion to dismiss (R. 3) was sustained by the Commission (R. 13) on the ground that enactment of the Act of August 1, 1914, was a legitimate exertion of the Government's administrative control over the tribal property (R. 4-13). The Court of Claims affirmed (R. 28).

ARGUMENT

1. Petitioner invokes (Pet. 6, 20) the parts of section 21 of the Act of June 28, 1898,[2] and of sections 30 and 35 of the Act of July 1, 1902 (pp. 3-4, *supra*) which provided for the making of member-

[2] As the text indicates, section 21 of the Act of June 28, 1898, is relied on by petitioner. Despite its intimations to the contrary (Pet. 6, 7, 13, 20), the Atoka Agreement, incorporated in section 29 of that Act, is not involved here. None of its provisions relates to the enrollment of members of the Choctaw tribe.

ship rolls by the Dawes Commission and their approval by the Secretary of the Interior and which contemplated (see sec. 30) the completion of those rolls "when there shall have been submitted to and approved by the Secretary of the Interior lists embracing names of all those lawfully entitled to enrollment". Next, petitioner—without citing the enactment—necessarily assumes that the proviso to section 2 of the Act of April 26, 1906 (p. 4, *supra*), directing full completion of the rolls by March 4, 1907, and prohibiting the Secretary from approving enrollments thereafter, amounted to a determination by the United States that as of that date all those lawfully entitled to enrollment had been enrolled. Upon this implicit assumption, petitioner contends (see e.g. Pet. 5, 7, 10, 19) that those on the rolls on March 4, 1907, had a vested right to the undistributed money of the tribe. In consequence, it concludes (Pet. 11, 12-13, 19) that when by section 17 of the Act of August 1, 1914 (p. 5, *supra*), the Secretary of the Interior was authorized to add to the rolls additional names and to pay to those named a part of the fund, the United States confiscated tribal money.

Petitioner's contention is thus premised on the notion that the Acts of June 28, 1898, and July 1, 1902, were contracts with it which the United States had no right to change without its consent (see e.g., Pet. 3, 4, 5, 6, 7, 19). There is no warrant for this view. As this Court pointed out in *Choate* v. *Trapp*, 224 U.S. 665, 671:

> The Tribes have been regarded as dependent nations, and treaties with them have been looked upon not as contracts, but as public laws which could be abrogated at the will of the United States.
>
> This sovereign and plenary power was exercised and retained in all the dealings and legislation under which the lands of the Choctaws and Chickasaws were divided in severalty among the members of the Tribes. For, although the Atoka Agreement is in the form of a contract it is still an integral part of the Curtis Act and, if not a treaty, is a public law relating to tribal property, and as such was amendable and repealable at the will of Congress.

Again in *Gritts* v. *Fisher*, 224 U.S. 640, in dealing with a cognate statute applicable to the Cherokee tribe, the Court said (p. 648):

> The difficulty with the appellants' contention is that it treats the act of 1902 as a contract, when "it is only an act of Congress and can have no greater effect." * * * It was but an exertion of the administrative control of the Government over the tribal property of tribal Indians, and was subject to change by Congress at any time before it was carried into effect and while the tribal relations continued.

The mere enactment in 1898 and 1902 of the provisions relied on by petitioner did not create vested rights. They simply prescribed procedures for the compilation of the tribal rolls and made enrollment prerequisite to a share in the tribal property. And while Section 30 of the 1902 Act contemplated a completion of the rolls it set no time limit upon their preparation.

It is true that the proviso to Section 2 of the 1906 Act directed that the rolls be fully completed by March 4, 1907, and deprived the Secretary of the Interior of jurisdiction to add any names to the rolls after that date. But like the 1898 and 1902 Acts, this was "a public law relating to tribal property, and as such was amendable and repealable at the will of Congress". *Choate* v. *Trapp*, 224 U.S. 665, 671. Thus, the 1906 Act was not a grant of a proportionate part of the undistributed tribal property in the custody of the United States to those who were on the rolls on March 4, 1907. And, since the Choctaw Nation had not been freed from governmental control, the United States was fully empowered, if it seemed wise to do so, to determine later that the tribe had other members and to allot and distribute tribal property to them. *Wallace* v. *Adams*, 204 U.S. 415, 423; *Lowe* v. *Fisher*, 223 U.S. 95, 102, *et seq.*; *Gritts* v. *Fisher*, 224 U.S. 640. That is what was done by Section 17 of the Act of August 1, 1914. In authorizing the Secretary of the Interior to add names to the rolls and to make payments to them from the undistributed funds of

petitioner, the United States merely exerted its administrative control over the tribal property of tribal Indians. Its actions in that capacity are not subject to judicial review. *Klamath Indians* v. *United States*, 296 U.S. 244, 252-253, 254-255, and cases cited.[3] Accordingly, the judgment of the Court of Claims affirming dismissal of the petition was correct.

2. The Court of Claims declined to accept the foregoing argument. Instead it expressed the belief that the Choctaws whose names appeared on the rolls "when they were closed in 1907" were vested with an interest in the undistributed property (R. 21) and that after that date Congress could not change the criteria for membership (R. 22). However, upon consideration of the legislative history of Section 17 of the Act of 1914 of which it took judicial notice (R. 22-26), the court concluded (R. 26): "By the Act of August 1, 1914 (Section 17) it [Congress] did not alter in any respect the criteria for membership which had been applied to those who were on the rolls in 1907. It

[3] Where, unlike the situation here, the United States has departed from the role of guardian and treated tribal property as governmental property, it assumes an obligation to make just compensation. See e.g., *United States* v. *Mille Lac Chippewas*, 229 U.S. 498, 509-510; *Lane* v. *Pueblo of Santa Rosa*, 249 U.S. 110, 113; *United States* v. *Creek Nation*, 295 U.S. 103, 110-111; *Chippewa Indians* v. *United States*, 301 U.S. 358, 375-376, cited by petitioner at pp. 12-13. Obviously, these cases are not in conflict with the judgment below.

merely added to the rolls a group of people who met all the tests applied to those whose names had been placed on the 1907 rolls."

Petitioner contends (Pet. 5, 13-14, 16-19) that since the record contained no evidence on this question of fact it should not have been determined by the Court of Claims. Whatever the merits of this contention, it is clear—for the reasons already set forth—that the judgment below is correct.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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MAY 1952.

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